to be heard thereon. The proceeding by the states in the exercise of their right of eminent domain, is often had before commissioners of assessment or special boards appointed for that purpose. It can hardly be doubted that Congress might provide for inquisition as to the value of property to be taken by similar instrumentalities, and yet if the proceeding be a suit at common law, the intervention of a jury would be required by the seventh amendment to the Constitution.

I think that the decision of the majority of the court in including the proceeding in this case under the general designation of a suit at common law, with which the circuit courts of the United States are invested by the eleventh section of the Judiciary Act, goes beyond previous adjudications and is in conflict with them.

Nor am I able to agree with the majority in their opinion, or at least intimation, that the authority to purchase carries with it authority to acquire by condemnation. The one supposes an agreement upon valuation and a voluntary conveyance of the property; the other implies a compulsory taking and a contestation as to the value: *Beekman* v. *The Saratoga & Schenectady Railroad Co.*, 3 Paige 75; *Railroad Co.* v. *Davis*, 2 Dev. & Batt. 465; *Willyard* v. *Hamilton*, 7 Ham. (O.) 453; *Livingston* v. *The Mayor of New York*, 7 Wend. 85; *Koppikus* v. *State Capitol Commissioners*, 16 Cal. 249.

For these reasons I am compelled to dissent from the opinion of the court.

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*United States District Court, Western District of Tennessee.*

## EX PARTE WADDY THOMPSON.[1]

The United States courts have power under the writ of *habeas corpus* to discharge persons from the custody of state officers, where it appears that they are held under a state law which seeks to punish them for executing a law of the United States, or where the act for which they are held was done in pursuance of the process of a Federal court.

But where a party is in custody of a state officer under an indictment for larceny and sets up as a justification for the act complained of a writ of replevin issued from a United States court, the latter court will on *habeas corpus* inquire into the fact whether its writ was fraudulently obtained for the purpose of carrying off

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[1] We are indebted for this case to L. B. McFarland, Esq., of counsel for respondent.—Ed. Am. Law Reg.

the property, and if satisfied of that fact, will remand the relator to the custody of the state officer.

A writ regular on its face is a justification to the officer to whom it is addressed for everything that he may lawfully do under such an authority, but this rule does not extend to a party who has procured the writ by fraud.

THIS was a writ of *habeas corpus* addressed to the sheriff of Shelby county, Tennessee, requiring him to produce before the judge of this district the body of Waddy Thompson, alleged to be unlawfully detained by the respondent. In obedience to the writ the sheriff produced the petitioner, and returned that he held him by virtue of a *capias* issued upon indictments for larceny and horse-stealing found by the grand jury of Shelby county. This return was neither traversed nor confessed and avoided as contemplated by the Revised Statutes, but the facts upon which Thompson claimed his discharge were substantially as follows:—

That Mrs. Francis Wilkerson, a citizen of Missouri, having a claim to the possession of certain goods and chattels unlawfully detained by certain parties in Memphis, Tennessee, and having failed to obtain the same upon repeated demands, or to receive any satisfactory accounting therefor, on October 20th 1874, instituted an action of replevin in the Circuit Court of the United States for this district, intrusting the inauguration and conduct of the suit to one Arnett, an attorney of St. Louis, to whom she gave a power of attorney authorizing such suit; and to be aided, if necessary, by the relator, who was her son-in-law, and who also held a general power of attorney from her in relation to her matters of business; that Arnett made the oath required by statute, and gave a bond, with Elijah Smith and Benjamin F. Carroll as sureties, whereupon process was issued requiring the marshal to take possession of the property in question and deliver it to the plaintiff, or her agent; that the writ was partially executed by the marshal taking possession of a portion of the goods and delivering them to Arnett. The petition further set forth that one Hendrix, one of the defendants in the replevin, made oath before a clerk of this court of the insufficiency of the bond, and obtained from the district judge an order suspending further proceedings; that horses and other property which had been placed in the possession of Arnett, were by his direction placed on a steamboat for the purpose of delivering them to his principal in Missouri; that these goods were landed on the Arkansas shore, a few miles above Memphis, when Hendrix, accompanied by armed companions, procured

a steam tug, boarded his boat, and, by intimidation, induced Arnett and the relator to return the property that had been delivered to them by the marshal, under an agreement that the title to the same should be settled by civil suits then pending. The goods and horses were accordingly brought back and delivered to the defendants in the replevin suit; that, notwithstanding the writ had been duly issued by the clerk of this court, and executed by the marshal of this district, the defendants in the replevin suit procured indictments against the relator, Arnett, and the sureties upon the bond for perjury and larceny; that these indictments were intended to frustrate and delay the plaintiff in the replevin suit in the prosecution of her remedy by intimidating relator, and thereby to oust the Circuit Court of the United States of its rightful jurisdiction over this suit, and to drive the plaintiff to a remedy in the state court where by local influence defendants hoped to obtain an unfair advantage; that relator having given bonds upon these indictments, and returned to his home in Missouri, the firm of Hendrix, Carter & Co., defendants in the replevin suit, instituted an action against the relator and Mrs. Wilkerson, for malicious prosecution, in bringing this action of replevin, and that in this suit the property which she was attempting to recover was attached. He further charged that the criminal court had no jurisdiction to try him upon these indictments, and that he was unjustly restrained of his liberty; that if guilty of any wrongful act whatever it was against the peace and dignity of the United States. He further claimed that he had a perfect right to do everything that was done towards the taking of the property named in the replevin, and was therefore not guilty of larceny or horse-stealing, and that the United States courts have exclusive jurisdiction over him for the punishment of the offence, if any there be.

*T. M. Brown*, *W. C. Folkes* and *J. J. Du Bose*, for the relator.

*L. E. Wright*, attorney-general, *L. B. Horrigan* and *L. B. McFarland*, for the sheriff.

BROWN, District Judge.—It is claimed by the relator that as the sheriff made no answer to the facts set forth in this petition they are to be taken as true, and that he is therefore entitled to his discharge. I think, however, he misapprehends the law upon this point. The petition is simply the basis upon which the writ

is issued. No copy of it is required to be served upon the respondent in the writ, who is required to make his return to the writ itself, and not by way of answer to the petition, which has performed its office as soon as the fiat is signed. A return may be traversed or confessed and avoided by way of affidavit or oral testimony, but I know of no practice requiring an answer to be made to the petition itself. It would have been proper for the relator to confess and avoid the return by repeating in his denial the facts set up in the petition. This is evidently contemplated by section 760 hereafter quoted, though I know of no practice requiring it to be done. The testimony was taken as if the issue had been made upon the return, and as no objection was interposed to this course until the argument of the case, I shall proceed to dispose of it as if an issue had been made by the pleading.

By section 753 of the Revised Statutes, "the writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody * * * for an act done or omitted, in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof." Although the words used are those of exclusion, there is no doubt of the power of this court to issue a writ of *habeas corpus* in cases falling within the above provision.

By section 754 application must be made "by complainant in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known."

By section 760 the petitioner "may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath."

By section 761 the judge "shall proceed in a summary way to determine the facts of the case by hearing the testimony and argument, and thereupon to dispose of the party as law and justice require."

The section first above quoted is substantially a re-enactment of the Act of 1833, commonly known as the "Force Bill," and was adopted in view of the nullification laws of South Carolina, by which an attempt had been made to punish officers of the United States for executing the laws of Congress within that

state. But it is now settled that this act gives relief to one in state custody not only when he is held under a law of the state which seeks expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the state, which applies to all persons equally, where it appears he is justified for the act done, because done in pursuance of the process of a United States court (*United States ex rel. Roberts* v. *Jailer of Fayette County*, 2 Abbott U. S. 277). At the same time the power given to the Federal courts thus to arrest the arm of the state authorities, and to discharge a person held by them is one of great delicacy, and should only be exercised where it clearly appears that justice demands it. Such power has rarely been invoked, except under circumstances tending to show strongly that the state was about to use its authority to oppress the party imprisoned in defiance of the laws of the general government. Nothing could render the act more justly odious than to permit the writ of *habeas corpus* to be employed to relieve a party from the legal consequences of crime against the sovereignty of a state.

If it appears, however, that the relator was justified by the process of this court in doing what he has done, the sections above quoted authorize and require his discharge. The testimony taken at considerable length reveals substantially the following facts:

The relator, who was son-in-law of Mrs. Wilkerson, holding a general power of attorney from her, came to Memphis from Missouri, in the month of October 1874, accompanied by one Arnett, an attorney-at-law at St. Louis, for the purpose of asserting her claim to the property covered by the writ of replevin. With the view of hastening the disposition of the case, it was conceded by the learned counsel for the state, that the relator, in good faith, supposed that Mrs. Wilkerson was entitled to the possession of the property covered by the writ. On arriving at Memphis, he and Arnett put up at the Commercial Hotel, where they first met Carroll, who afterwards became one of the sureties upon the replevin bond. * * * * *

[Here the learned judge reviewed the testimony as to the means used in getting worthless securities on the replevin bond.]

After one or two ineffectual efforts he finally procured the services of an attorney, who drew an affidavit sworn to by Arnett, claiming the possession of the stock of liquors, and safe and con-

tents in the store of Hendrix, Carter & Co., the entire stock in trade of a firm of nurserymen, and three horses belonging to parties not connected in any way with the other defendants, though the horses had been purchased of Hendrix, Carter & Co. It may also be observed here that Hendrix, Carter & Co. were in no way connected with the owners of the nursery, and that plaintiff proceeding properly would have been compelled to bring at least three, and probably four or five separate suits to recover possession of these distinct parcels. Upon this affidavit a sweeping writ of replevin was issued against defendants, commanding the marshal to take possession of all the property named in the writ, and to deliver the same to the plaintiff or her agent. Taking Arnett and his two sureties to the clerk's office, a bond was signed, prior to the issuing of the writ, by Arnett, as attorney for the plaintiff, by Homer B. Carroll, signing his name as Benjamin F. Carroll, and by Elijah Smith, whose true name, and, indeed, whose very existence is unknown. Each of these sureties swore that he was worth the sum of $30,000 in real estate in Shelby and Tipton counties. This was done in the presence and by direction of Thompson, who knew perfectly their utter insolvency. Shortly afterward Arnett advised Carroll to get out of town as soon as possible, which he proceeded to do by hiring a skiff to take him across the river. To secure the speedy service of the writ and transportation of the property, relator hired a steamboat plying between Memphis and Mound City, Arkansas, to wait over her usual time of departure, promising to pay ten dollars per hour for her detention. Deputies were dispatched from the marshal's office to different parts of the city where the property covered by the writ was lying. Six furniture wagons were sent to the nursery and about a thousand pots of flowers, besides knives, forks and spoons and other articles were loaded upon them and hurried away to the steamer, which was lying in waiting to take them across the river. Several horses were seized by another deputy, who at once drove them on board the steamboat. Fifty or sixty drays were sent to the store of Hendrix, Carter & Co., for the purpose of removing their entire stock in a similar way, and loading it upon the boat. The relator formerly had a desk in their establishment, knew the office hours of the partners, and instructed the marshal not to go there until the book-keeper had gone away and locked the safe, and the steamer was on the point of departure. When the marshal

announced his intention to Hendrix of seizing all the goods in his establishment, Hendrix asked for a little time, went to the clerk's office to look at the bond, satisfied himself the sureties were insolvent, and made affidavit of the fact, when the district judge was telegraphed to to stop proceedings. The marshal refused to place the property on the boat, but put custodians in charge during the night. His suspicions were excited none too soon. Great anxiety was manifested by Thompson to get possession of this stock, but finding himself foiled the boat was compelled to put off without it. It proceeded to Mound City about sun-down, with Thompson, Arnett and Carroll, who had dismissed his skiff, on board. After arriving at Mound City, some of the defendants made up a party, hired a steam tug, went in pursuit, and compelled the return of the property. Relator afterwards returned to Memphis, saw the counsel employed by Hendrix, Carter & Co., confessed to him the bond was bogus and fraudulent; said they had him where he meant to get them, and promised if they would let him out he would furnish information to hold the clerk and marshal. I take pleasure in saying there is not the slightest evidence to show that either of these officers or their deputies acted corruptly or in bad faith, although in view of the magnitude of the bond a little more care in approving it would have been commendable. The writ of replevin was soon after dismissed and his claim to the property abandoned.

This is but a bare outline of the facts fully proved—facts which the relator made but feeble attempt to deny. I am forced to the conclusion that it is a case of gross and infamous fraud practised upon the court.

It is claimed by the relator, however, that admitting this to be true, he is still entitled to his discharge, inasmuch as the writ of replevin was valid upon its face. There is no question that a writ valid upon its face will protect the officer executing it, notwithstanding it may have been irregularly issued, or may be voidable for want of jurisdiction. There is a clear distinction, however, between the officer who executes the writ and the party who procures it to be issued; as against the latter, it may be shown to be void from facts not appearing upon its face. From a multitude of cases drawing this distinction, I cite the following:

*Lavacool* v. *Boughton*, 5 Wend. 173; *Lodes* v. *Phelps*, 13 Wend. 48; *Adkins* v. *Brewer*, 3 Cow. 206; *Whitney* v. *Schenfelt*, 1 Den.

594; *State* v. *Weed*, 1 Fost. 262; *Rogers* v. *Mulliner*, 6 Wend. 597; *Taylor* v. *Iresk*, 7 Cow. 249.

By the Code of Tennessee, before a writ of replevin can be issued a bond must be filed in double the value of the property covered by the writ. Whether the writ is totally void without such bond it is perhaps unnecessary to consider. There is no doubt that a writ of attachment issued without such bond where the statute requires it, is wholly void (see Drake on Attachments, &c.), and it is presumed that the same rule would be held to apply to writs of replevin, although in some states, where a bond is not required before the issuing of the writ, it is held that the writ is not thereby invalidated, if the bond is executed before the property is delivered to the plaintiff. There is a clear distinction between the statutes which require the bond to be executed before the property is delivered over, and those which require it before the issuing of the writ. In this case no bond was ever given. It is not merely a case of insufficiency of sureties, which may be renewed by order of the court. The relator procured the execution of the bond by sureties, whom he knew to be utterly irresponsible and at least one of whom forged the signature of a fictitious person.

The position assumed by relator is that if the writ upon its face authorized the taking, which is the subject of the larceny for which he is indicted, he "is entitled to his discharge, notwithstanding the writ was procured by perjury, and used for the purpose of committing a larceny. Counsel cannot have fully apprehended the consequences of this doctrine. May a deputy marshal, holding a *capias* of this court, deliberately murder the party he is seeking to arrest? There is no general power in the Federal courts to punish murder, and if discharged from the custody of the state, his crime would go practically unpunished. This court I think is bound to inquire into the legality of the use as well as the validity of the process itself. This was the view evidently taken by the learned judge for the District of Kentucky in the *Roberts* case above cited.

In *Commonwealth* v. *Low*, Thacher's Criminal Cases 477, it was held that if a man, having a right of action, makes use of a process which he knows he has no right to adopt, to get the property of his debtor, and with intent to defraud him, it is larceny.

It is well settled that a combination of two or more to accom-

plish a lawful purpose by unlawful means is indictable as a conspiracy. Says Lord HALE (P. C. 507): "A. hath the mind to get the goods of B. into his possession, privately delivers an ejectment, and obtains judgment against a casual ejector, and thereby gets possession and takes the goods; if it were *animo furandi*, it is larceny." So Lord COKE (3 Inst. 108): "If a man seeing the horse of B. in his pasture, and having a mind to steal him, cometh to the sheriff, and pretending the horse to be his, obtaineth the horse to be delivered to him by replevin, yet this is a felonious and fraudulent taking."

I have not lost sight of the concession in this case that relator supposed that he was entitled to the possession of this property. The question here is not whether he was entitled to the possession of this property; nor whether he was guilty of larceny in obtaining possession; not even whether he was entitled to possession, but whether he was justified by his writ in obtaining this possession. Now, nothing is better settled in the law of trespass than that an officer entitled to levy upon property becomes a trespasser *ab initio* by an abuse of the process. I am satisfied in this case that the relator commenced this suit not for the purpose of asserting a *bonâ fide* claim to the property, but of spiriting it away under the forms of law, and disposing of it before proceedings could be taken for its reclamation. It would be a strange interpretation of the law, if, after having been guilty of forgery, fraud and subornation of perjury in procuring the process of this court, he could still claim to be protected by it in carrying out his schemes. I hold, then, that, although the marshal was protected by this writ in what he did in execution thereof, yet as to the relator in this case, it was fraudulent and void, and that so far from being entitled to protection by this court, his case should be laid before the next grand jury of this district, for such action as it may see fit to take, and the district attorney is directed to see that this is done. Provided, however, that no action be taken on any indictment until he shall have been discharged by a state court.

It results that the prisoner must be remanded to the custody of the sheriff of Shelby county.